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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ROBIN A. KAY,

Plaintiff and Respondent, **A142958**

v. **(San Francisco County Super. Ct. No. CGC13534398)**

JASON L. OLIVER,

Defendant and Appellant.

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Jason L. Oliver appeals from the denial of his Code of Civil Procedure section 425.16 special motion to strike. He claims the trial court erred by denying the motion because Robin A. Kay's complaint arises from his conduct in petitioning for attorney fees, and because Robin could not establish a probability of prevailing on the merits.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Marcisz Litigation

Attorneys Oliver, John W. Dalton, and Philip E. Kay represented Lindsay Marcisz, Maureen Hora, and Jessica and Blair Pollastrini (collectively, plaintiffs) in a sexual harassment case against UltraStar Cinemas (UltraStar) and others, *Marcisz v. UltraStar*

[1] Unless noted, all further statutory references are to the Code of Civil Procedure. We refer to Robin by her first name for clarity and convenience. Other defendants who are not parties to this appeal are mentioned only where necessary.

Cinemas, et al., San Diego Superior Court case No. GIC820896 (*Marcisz*). The attorneys had a contingency fee agreement with plaintiffs, who consented to a fee splitting arrangement between Oliver, Dalton, and Kay. The attorneys later modified the fee splitting agreement.

In 2005, a jury awarded plaintiffs $6,850,000 in compensatory and punitive damages. The court, however, granted a new trial on the ground the jury awarded excessive damages and plaintiffs appealed. The Fourth District Court of Appeal reinstated the compensatory damages award and remanded for a new trial on punitive damages. (*Marcisz v. Movie Theatre Entertainment Group, Inc.* (May 30, 2008, D047009) [nonpub. opn].) On remand, plaintiffs waived their claim for punitive damages. The case was stayed during UltraStar's bankruptcy proceedings.

In March 2009, Kay told Oliver he wanted to be substituted out as counsel. In September 2009, Kay filed a lien on "attorney's fees and/or costs awarded or to be paid" in *Marcisz*. The court entered judgment for plaintiffs in June 2010. Effective August 13, 2010, the California Supreme Court suspended Kay from the practice of law for five years, in part based on his conduct in *Marcisz*. In late 2010, Kay moved to withdraw as counsel based on "conflicts and irreparable breakdown" between Kay, plaintiffs, and "subordinate counsel." The court granted the motion in December 2010, noting Kay was "suspended from the practice of law" and providing "Kay is relieved immediately. Plaintiffs are represented by . . . Oliver and . . . Dalton."

In 2011, Oliver and Dalton moved for $3,090,549.95 in attorney fees pursuant to Government Code section 12965. Kay filed a separate motion for attorney fees. Kay died in August 2012, while the fee motions were pending. In September 2012, the court granted Oliver and Dalton's motion and awarded them $2,624,903.25 in attorney fees. The court later ordered UltraStar to pay those fees directly to Oliver and Dalton. The court also awarded Robin — Kay's widow and personal representative of his estate — $1,126,200 in attorney fees. Robin appealed from the order directing the attorney fees awarded to Oliver and Dalton be paid directly them. In 2014, the Fourth District Court of

Appeal affirmed. (*Marcisz v. UltraStar Cinemas* (Aug. 29, 2014, D06392) [nonpub. opn].)[2]

Robin's Complaint

In 2013, Robin filed an unverified form complaint on behalf of Kay's estate against Oliver, Dalton, and plaintiffs for breach of contract, breach of fiduciary duty, fraud, and intentional interference with contractual relations and prospective economic advantage. Robin alleged: (1) Oliver and Dalton represented Kay "from time to time as Mr. Kay's personal legal counsel[;]" (2) Kay entered into an agreement with Oliver and Dalton "to split their portion of the recovery" in *Marcisz*; (3) Oliver and Dalton's demand for the attorney fees in *Marcisz* to be paid directly "to them, rather than to Kay or some other means to hold the funds in trust while [Robin] resolve[d] the dispute" about the fees was "adverse to their former client and business partner, Kay and created a conflict" with plaintiffs; (4) Oliver and Dalton breached the duty of loyalty they owed to Kay and breached the terms of their fee splitting agreement; and (5) Oliver and Dalton's conduct was "malicious and fraudulent[,]" and intended to deprive Robin of $2,000,000 in fees and costs owed to Kay pursuant to the fee splitting agreement. Robin sought $3,000,000 in damages and equitable and injunctive relief. As of April 2014, UltraStar had not paid the judgment or Oliver's attorneys fees in *Marcisz*.

Oliver's Special Motion to Strike

Oliver filed a special motion to strike pursuant to section 425.16. He argued the "conduct alleged in the Complaint was undertaken in the furtherance of" his and plaintiffs' "rights of petition or free speech and judicial redress" in *Marcisz*. (§ 425.16,

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[2] On our own motion and pursuant to Oliver's unopposed request, we take judicial notice of the two prior appellate opinions in *Marcisz* for background purposes and not for the facts in those opinions. (Evid. Code, §§ 451, subd. (a), 452, subd. (a).) We decline to take judicial notice of a complaint filed by Robin in another case against other defendants. That complaint was not before the trial court when it ruled on Oliver's special motion to strike, and it is not relevant to the issues in this appeal. (*Shuts v. Covenant Holdco LLC* (2012) 208 Cal.App.4th 609, 622, fn. 7; *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482.)

subd. (e)(1), (2).)[3] According to Oliver, the complaint arose from the award of attorney fees in *Marcisz* and "directly implicate[d]" his communications with his clients, the plaintiffs in *Marcisz*. Oliver characterized the complaint as "a transparent attempt" to attack his representation of plaintiffs and a "strategic attempt to drive a wedge" between him and plaintiffs. Oliver also claimed Robin could not demonstrate a probability of prevailing on the merits.

In opposition, Robin argued the gravamen of her complaint arose from a dispute regarding the attorney fee award in *Marcisz*, not from protected petitioning activity. Robin explained: "[e]ven though protected activity arguably lurks in the background . . . the actual dispute concerns disputed ownership of the fee award" in *Marcisz* "and not protected activity." Robin also claimed her complaint was "*legally sufficient*" and she could demonstrate a probability of prevailing on the merits. In reply, Oliver contended the complaint was "exclusively rooted in protected activity" because his defense would require evidence based on "statements or writings made in" *Marcisz*.

Following a hearing, the court denied the special motion to strike, concluding Oliver had not demonstrated "the complaint arises out of an act in furtherance of his right to petition or free speech. . . . The gravamen of the allegations in the complaint against Oliver is that he breached a written or oral agreement to split fees with . . . Kay. Although the fees were awarded in a judicial proceeding, the complaint does not dispute the amount of fees that were awarded. How the fees should be split between the attorneys does not 'relate to the substantive issues in the litigation.' [Citation.] The complaint arising from how the fees should be split does not affect Olivers's clients' ability to seek redress in court. The court already awarded the substantive relief sought."

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[3] Section 425.16, subdivision (e) defines an "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue'" as including: "(1) any written or oral statement or writing made before a . . . judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body, or any other official proceeding authorized by law[.]"

DISCUSSION

"A defendant may bring a special motion to strike any cause of action 'arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or California Constitution in connection with a public issue.' [Citation.] When ruling on an anti-SLAPP motion, the trial court employs a two-step process. It first looks to see whether the moving party has made a prima facie showing that the challenged causes of action arise from protected activity. [Citation.] . . . [¶] The moving party has the initial burden of making a prima facie showing that one or more causes of action arise from an act in furtherance of the constitutional right of petition or free speech in connection with a public issue. [Citations.] The motion must be denied if the required prima facie showing is not made. [Citation.]" (*Drell v. Cohen* (2014) 232 Cal.App.4th 24, 28-29 (*Cohen*).) Our review is de novo. (*Id.* at p. 29.)

Oliver contends he established the complaint arises from protected petitioning activity — he claims Robin sued him because he sought attorney fees in *Marcisz* over Kay's objection. "Statements made in litigation, or in connection with litigation, are protected by section 425.16, subdivision (e). [Citation.] Courts have taken a fairly expansive view of what constitutes litigation-related activity for purposes of section 425.16. [Citation.] In making a prima facie showing, however, it is not enough to establish that the action was filed in response to or in retaliation for a party's exercise of the right to petition. [Citations.] Rather, the claim must be based on the protected petitioning activity. [Citation.]" (*Cohen, supra,* 232 Cal.App.4th at p. 29.)

The trial court was not persuaded by Oliver's argument and neither are we. Robin does not seek to impose liability on Oliver based on his conduct in seeking attorney fees in *Marcisz* — she seeks entitlement to the fees, the amount of which has already been set. The issue posed by Robin's complaint is not whether Oliver wrongfully petitioned for attorney fees, but what Oliver is obligated to do with the attorney fees when he collects them and whether Oliver breached an agreement to split those fees. (*Chodos v. Cole* (2012) 210 Cal.App.4th 692, 704 ["principle basis" of plaintiff's claim concerned "conduct constituting a breach of *professional duty*, not statements or filings made in

connection with litigation"]; *Ben-Shahar v. Pickart* (2014) 231 Cal.App.4th 1043, 1053 [complaint not directed at defendants' filing or settling of unlawful detainer action, but plaintiffs' "acts constituting a purported breach of the settlement agreements"]; *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 729 (*Freeman*).)

Freeman is instructive. In that case, two clients sued their former attorney for breach of contractual and fiduciary duty obligations. (*Freeman, supra,* 154 Cal.App.4th at pp. 727-728.) Plaintiffs' breach of contract cause of action alleged the attorney breached the fee sharing agreement and his fiduciary duty to them by, among other things, representing parties with adverse interests. (*Id.* at p. 729.) The trial court denied the attorney's special motion to strike and the appellate court affirmed, concluding the attorney's litigation activity was collateral to the allegation the attorney breached a duty of loyalty he owed to his clients. (*Id.* at p. 732.) The *Freeman* court explained, "[t]here is no doubt plaintiffs' causes of action have as a major focus [the attorney's] actions in [the prior litigation]. However, the fact plaintiffs' claims are related to or associated with [the attorney's] litigation activities is not enough. 'Although a party's litigation-related activities constitute "act[s] in furtherance of a person's right of petition or free speech,' it does not follow that any claims associated with those activities are subject to the anti-SLAPP statute. . . ." (*Id.* at pp. 729-830, quoting *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537-1538.) The same is true here. The award of attorney fees in *Marcisz* is "related to or associated with [Oliver's] litigation activities[,]" but this is "not enough" to bring Robin's complaint within section 425.16. (*Freeman, supra,* 154 Cal.App.4th at p. 729.) That *Freeman* was a lawsuit filed by clients against their former attorney does not prevent its logic from applying here.

Cohen is also on point. There, defendant attorneys represented a client in a personal injury action on a contingent fee basis. (*Cohen, supra,* 232 Cal.App.4th at p. 26.) They withdrew from the representation and attorney Michael Drell took over the case. Defendants asserted an attorney fee lien, informing one of the insurers in the personal injury case that payment of funds to the client was subject to a lien for their fees incurred during their representation. Drell negotiated the settlement of the case, and the

insurer made the check payable to Drell and defendants. Drell sought declaratory relief "to determine the status of defendants' lien." (*Id.* at p. 27.) Defendants filed a special motion to strike, averring the complaint "arose from their protected activity of asserting a lien in a demand letter that threatened litigation." (*Ibid.*) The trial court denied the motion, concluding the gravamen of the complaint was not protected activity.

On appeal, defendants argued the complaint was based on their assertion of their lien in their demand letter. (*Cohen, supra,* 232 Cal.App.4th at p. 27.) The *Cohen* court disagreed and held the complaint "did not allege defendants engaged in wrongdoing by asserting their lien. Rather, the complaint asked the court to declare the parties' respective rights to attorney fees. The complaint necessarily refers to defendants' lien, since their demand letter is key evidence of plaintiff's need to obtain a declaration of rights, but the complaint does not seek to prevent defendants from exercising their right to assert their lien." (*Id.* at p. 30, fn. omitted.) As the court explained, "[n]one of the purposes of the anti-SLAPP statute would be served by elevating a fee dispute to the constitutional arena, thereby requiring a party seeking a declaration of rights under an attorney lien to demonstrate a probability of success on the merits in order to obtain equitable relief." (*Ibid.*)

As in *Cohen*, this is "a fee dispute" and the complaint does not allege Oliver "engaged in wrongdoing" by seeking attorney fees in *Marcisz*. (*Cohen, supra,* 232 Cal.App.4th at p. 30.) Instead, it alleges Oliver breached the fee splitting agreement and a duty of loyalty he owed to Kay. That the complaint refers to *Marcisz* does not bring the complaint within section 425.16. (See *Personal Court Reporters, Inc. v. Rand* (2012) 205 Cal.App.4th 182, 189-194 [lawsuit by court reporters to recover fees incurred in underlying action did not target protected activity].) Oliver's attempt to distinguish *Cohen* is unpersuasive.[4]

[4] Robin's complaint is not — as Oliver suggests — based on his representation of plaintiffs. This is not a situation like the one in *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 489, where the plaintiff's claims arose from communications between an attorney and a client about pending litigation. As we have explained, the principal

Nor are we persuaded by Oliver's claim that the lawsuit arises out of protected activity because Robin's case "is built on the judicial record" in *Marcisz*. "Although petitioning activity is part of the evidentiary landscape within which" Robin's claims arose, the gravamen of her claims is Oliver "engaged in nonpetitioning activity inconsistent" with purported contractual and fiduciary obligations he owed to Kay. (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272 (*Hylton*); *Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 494 [relying in *Hylton* and concluding an attorney's litigation activities were "collateral to the principal thrust of [plaintiffs'] causes of action"].)

Robin's lawsuit does not arise out of communications made before a court or in connection with an issue being considered by a court. (§ 425.16, subd. (e)(1), (2).) Even when adopting "a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16" (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908), we cannot conclude a private dispute over the allocation of previously awarded attorney fees has anything to do with Oliver's right of petition. Having reached this result, we need not consider the parties' other arguments, including whether Robin has demonstrated a probability of prevailing. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80-81.)

DISPOSITION

The order denying Oliver's special motion to strike (§ 425.16) is affirmed. Robin is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

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thrust of the complaint is Robin's purported rights to a portion of the attorney fees previously awarded in *Marcisz*.

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Jones, P.J.

We concur:

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Simons, J.

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Needham, J.